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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

February 28, 1996

William F. Caton, Acting Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Re: MM Docket No. 94-116  
FM Table of Allotments  
Jefferson City, TN et al.

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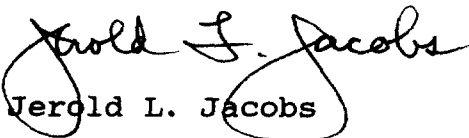
Dear Mr. Caton:

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Enclosed herewith for filing, on behalf of our client, Eaton P. Govan III and Berton B. Cagle, Jr., are an original and four (4) copies of its "REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION" in the above-referenced matter.

Please direct all inquiries and communications concerning this matter to the undersigned.

Very truly yours,

  
Jerold L. Jacobs

Enc.

cc: As on Certificate of Service (all w/enc.)

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 94-116
Table of Allotments,	)	
FM Broadcast Stations	)	RM-8507
(Jefferson City, Cumberland Gap	)	RM-8567
Elizabethton, Tennessee and	)	
Jonesville, Virginia)	)	

TO: Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

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**REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION**

**EATON P. GOVAN, III and BERTON B. CAGLE, JR.** ("Govan & Cagle"), licensee of Stations WEZG(FM), Channel 257A, Jefferson City, Tennessee, and WAEZ(FM), Channel 257C3, Elizabethton, Tennessee, by their attorneys, pursuant to §1.429(g) of the Commission's Rules, hereby reply to the February 15, 1996 "Opposition to Petition for Reconsideration" ("Opposition") filed by Holston Valley Broadcasting Corporation ("HVBC") in this proceeding. In support hereof, Govan & Cagle show the following:

1. On December 15, 1995, Govan & Cagle filed a timely Petition for Reconsideration ("Petition") of the Report and Order ("R&O"), 10 FCC Rcd 12207 (Mass Media Bur. 1995), in this proceeding. The Petition urged that the R&O erred in failing to substitute FM Channel 256A for Channel 257A at Jefferson City, Tennessee, reallocate Channel 256A from Jefferson City to Cumberland Gap, Tennessee, modify Station WEZG's license to specify Cumberland Gap as its community of license, substitute Channel 257C2 for Channel 257C3 at Elizabethton, Tennessee, and modify WAEZ's license to specify operation on the higher

powered channel. Instead, the R&O granted HVBC's counterproposal and allotted Channel 256A to Jonesville, Virginia.

2. HVBC filed the only response to Govan & Cagle's Petition. As Govan & Cagle will now demonstrate, the Opposition paints a misleading picture of the relevant facts and law in this case. In "setting the record straight," Govan & Cagle is reminded of the epigram of Justice Oliver Wendell Holmes, Jr. that: "Life is painting a picture, not doing a sum". See Mark DeWolfe Howe, ed., The Occasional Speeches of Justice Oliver Wendell Holmes, "The Class of '61," p. 161 (1962). The Commission's rules, policy statements, and case precedents in FM channel rulemaking proceedings do often amount to "doing a sum," because they are very precise as to relevant factual and legal criteria and the weight to be accorded thereto. Govan & Cagle ask that their proposals in this proceeding be judged according to the law and the facts, not HVBC's fanciful "pictures".

#### **I. Cumberland Gap Is Preferable to Jonesville When All Public Interest Factors Are Considered**

3. The Opposition (at ¶¶ 6-20) tries to depict (a) Jonesville, Virginia as desperately in need of a local radio service, (b) Jefferson County, Tennessee (where Station WEZG, Jefferson City, is currently located) as on the verge of losing "its only full-time licensed broadcast service", and (c) Cumberland Gap, Tennessee (the community to which Govan & Cagle would like Station WEZG to be relocated) as not needing any local radio service because it allegedly receives "abundant broadcast service from the neighboring communities of Middlesboro, Kentucky and Harrogate and Tazewell, Tennessee". Govan & Cagle submit that the realities are very different. Specifically, Jefferson County has nine Tennessee radio

reception services, apart from WEZG (see Petition at ¶19), Jonesville has 20 reception services (see Exhibit 1 of Govan & Cagle's January 4, 1995 Counterproposal Reply Comments in this proceeding), and Cumberland Gap has seven reception services, three of which are daytime-only AM stations and three of which are licensed to the Kentucky community of Middlesboro.

4. Despite these reception service facts, HVBC advances the novel view -- which has absolutely no support in Commission policy or case precedent -- that what counts is how many radio stations are in "close proximity" to Cumberland Gap or Jonesville. Simply stated, HVBC does not want the Commission to focus on the fact that Jonesville's 20 reception services exceed the combined reception services available in Jefferson County and Cumberland Gap. These realities belie and completely undercut HVBC's contention (Opp., ¶11) that Jonesville has a "need for Channel 256A [which is] prima facie greater than that of Cumberland Gap". Indeed, the factual record shows that the very opposite is the case -- Cumberland Gap clearly has a greater need than Jonesville for additional in-state radio service, especially a first local transmission service.

5. Next, HVBC maintains (Opp., ¶¶'s 12-13) that Jonesville's larger population and "public support" for a new FM service warrant a decisive preference under the Commission's precedents. However, the following chart demonstrates how Lee County (in which Jonesville is located) has steadily lost population since 1980, while Clairborne County (in which Cumberland Gap is located) has steadily gained population. The data suggest that Cumberland Gap and its surrounding area have a greater emerging need for a first local radio service than does Jonesville:

	<u>Lee County</u>	<u>Clairborne County</u>
1980 Census	25,956	24,595
1990 Census	24,496	26,137
1/1/95 Census Est.	24,400	28,400

Source: 1989 and 1996 Rand McNally Commercial Atlas & Marketing Guides

In Paragraphs 14-17 of their Petition, Govan & Cagle fully explained why the fact that Jonesville has a larger population than Cumberland Gap (927 versus 210) is not decisionally significant under the Commission's en banc decision in FM Table of Allotments (Seabrook TX et al.) ("Seabrook"), 10 FCC Rcd 9360, 9362 ¶9 (1995), in which the Commission held that no "automatic decisional preference [should be given] to small communities under 1,000". HVBC's reliance on FM Table of Allotments (Bostwick and Good Hope GA), 6 FCC Rcd 5796 (Mass Media Bur. 1991), is misplaced because, as an en banc Commission decision, the Seabrook case clearly overrules it.

6. Moreover, while HVBC has supplied letters from the Lee County Area Chamber of Commerce and the Lee County Industrial Development Authority to demonstrate "public support" for a Jonesville allotment, it fails to address the January 3, 1995 letter from Jonesville Mayor Ewell Bledsoe to the Commission, which was treated as a Counterproposal Reply Comment in this proceeding, in which Mr. Bledsoe, as Mayor of Jonesville, stated (at 2):

I am strongly opposed to Holston's proposal to add a new FM Broadcast Station to our community...As Mayor of Jonesville, Virginia, I urge the Federal Communications Commission to reject the Holston...Counterproposal which will clearly not serve the best interest of the citizens of Jonesville.

No wonder HVBC tries to rely on Lee County, rather than the proposed community of license of Jonesville, for its putative demonstration of "public support" for a Jonesville allotment!

7. Similarly, the Opposition ignores Govan & Cagle's extensive showings in their Petition that Cumberland Gap is the preferred community in a "fourth priority" full comparative analysis under FM Channel Policies/Procedures, 90 FCC 2d 88, 91-92 (1982). The reasons for the superiority of the Cumberland Gap/Elizabethton proposal are well summarized in Govan & Cagle's November 25, 1994 "Comments" (at 3-6) and their January 4, 1995 "Counterproposal Reply Comments" (at 12-14):

- Reallocating Channel 256A at Cumberland Gap would provide broadcast service to 66,527 persons, and would also allow Station WAEZ to upgrade to Channel 257C2 at Elizabethton, providing a new broadcast service to 93,766 persons. By contrast, the Jonesville counterproposal would only provide service to 43,406 persons, and the WAEZ upgrade is not possible if Channel 256A is allotted to Jonesville;
- The proposed Cumberland Gap allotment would provide broadcast service to over 1.3 million tourists who visit the Cumberland Gap National Historical Park each year. Jonesville does not enjoy a large tourist population;
- The Cumberland Gap area is a vital and growing region with a diverse economic base. Growth potential is very good. Auto traffic along U.S. Highway 25-E at Cumberland Gap is expected to double in the next 10 years. On the other hand, the Jonesville area has very limited retail and commercial activity with little prospect for improvement. There is substantial doubt that a broadcast station at Jonesville would be economically viable; and
- The combined reallocation of Station WEZG to Cumberland Gap and upgrade of Station WAEZ at Elizabethton would provide broadcast service to a total of 160,293 permanent residents (including a net WEZG/WAEZ audience gain of 50,727 persons) and to over 1.3 million tourists. The HVBC counterproposal would provide new service to only 43,406 persons.

8. However, HVBC attempts to nitpick Govan & Cagle's chart in Paragraph 18 of the Petition, which concludes that "the combined effect of granting Govan & Cagle's reallocation and upgrade proposals is to increase the combined service areas of Stations WEZG and WAEZ by 4,282 square kilometers and their combined audiences by 50,727 persons" and that "[t]his combination dramatically exceeds the results of HVBC's proposed allotment of Channel 256A

at Jonesville (2463 square kilometers and an audience of 43,406 persons)". HVBC retorts (Opp., ¶19) that a 13.56% advantage by Govan & Cagle's proposals over a Jonesville allotment is "far less than 'dramatic'". Govan & Cagle disagree. Although the absolute percentage figure of 13.56% may be numerically small, Govan & Cagle submit that a combined advantage of some 6000 to 7000 persons is decisionally significant, particularly where, as here, HVBC has attempted to receive a dispositive preference based on a 700-person differential between the populations of Jonesville and Cumberland Gap.

9. The Opposition (at ¶¶'s 14-16) also incorrectly asserts that Govan & Cagle have never attempted to rebut the "presumption" that withdrawal of existing reception service is "inimical to the public interest". Id. at ¶14. To the contrary, the Petition fully addressed that matter in Paragraphs 18-20. Most importantly, the Commission's recent decision in FM Table of Allotments (Calabash and Tabor City NC) ("Calabash"), 9 FCC Rcd 7857 (Mass Media Bur. 1994), demonstrates that loss of existing reception service does not undermine a reallocation proposal where, as here, other factors offset it. In Calabash, the Commission permitted the only fulltime radio station in Tabor City to be reallocated to Calabash, a community with a 1990 U.S. Census population of 1,210 persons, even though the move created a reception loss to 25,488 persons, because the move would allow the station to serve an additional 66,240 persons in the Calabash area and because the population within the loss area would continue to receive reception service from a number of other FM stations. Id. at 7857. Similarly, in Cumberland Gap, daytime Station WJFC(AM) will continue to provide local transmission service at Jefferson City, WEZG will serve 66,527 persons from its Cumberland Gap allotment and WAEZ will serve 93,766 new persons with its Elizabethton upgrade, and WEZG's reception service loss of

43,039 persons should have de minimis adverse consequences because those persons will continue to receive six to nine other FM reception services.

10. Thus, applying the teachings of Calabash to the Cumberland Gap and Jonesville allotment proposals, Govan & Cagle urge that their Cumberland Gap proposal should be preferred over HVBC's proposal, because HVBC would provide broadcast service to a much smaller geographic area and many fewer persons (43,406 persons in Jonesville versus either (a) 66,527 persons in Cumberland Gap, (b) a net gain of 50,727 persons from the WEZG and WAEZ allotments, or (c) a total audience of 160,293 persons for WEZG or WAEZ). When the area and population data are combined with the other plus factors outlined in Paragraphs 18 and 19 of the Petition, reallocoting Station WEZG to Cumberland Gap on Channel 256A and upgrading Station WAEZ to Channel 257C2 at Elizabethton are clearly shown to be a "preferential arrangement of allotments" under FM Channel Policies/Procedures, supra, and Modification of FM and TV Authorizations to Specify a New Community of License (MM Docket No. 88-526) ("Community of License"), 4 FCC Rcd 4870, 4873 ¶25 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990), as against allotting Channel 256A at Jonesville.

11. HVBC also faults Govan & Cagle (Opp., ¶17) for attempting to enhance Station WAEZ's audience in the Johnson City - Kingsport - Bristol metropolitan area without pointing out that their related effort is to move Station WEZG away from the Knoxville Urbanized Area. Such movements away from Urbanized Areas have been commended in Commission reallocation decisions, such as FM Table of Allotments (Scotland Neck and Pinetops NC), 10 FCC Rcd 11066 (Mass Media Bur. 1995). This is another public interest justification supporting Govan & Cagle's proposals, and Govan & Cagle do not apologize for attempting to increase Station WAEZ's audience at the same time. Such increases are wholly consistent with the underlying



philosophy in FM channel rulemaking proceedings -- to make a "fair, efficient, and equitable distribution of radio service" throughout the United States under Section 307(b) of the Communications Act of 1934, as amended.

## **II. The Cumberland Gap Proposal Complies With §73.315(b)**

12. Finally, HVBC challenges (Opp., ¶¶'s 25-26) Govan & Cagle's Tech Note 101 showing in their Petition, which establishes that their Cumberland Gap proposal complies with §73.315(b) of the Rules. As fully shown in Paragraph 7 of the Petition, Govan & Cagle urge that administrative due process and the public interest requirements of §1.429(b)(3) of the Rules require the Commission to take into account the Tech Note 101 engineering showing at this point in the proceeding. Moreover, the Petition (at ¶¶'s 8-12) fully demonstrates that, even though showing less than 100 percent city grade coverage, Govan & Cagle's data permit their consulting engineer (John J. Mullaney of Mullaney Engineering, Inc.) to reach his ultimate conclusion (Exh. EE at 7-8) that the R&O erred when it held that Govan & Cagle's Channel 256A proposal for Cumberland Gap violates §73.315(b) of the Rules. This is so because where, as here, an alternative coverage showing (Tech Note 101) is used to supplement the Commission's standard F (50,50) propagation curves, it is not necessary to demonstrate city grade coverage throughout 100 percent of the city. See Pathfinder Communications Corp. (WCUZ-FM), 3 FCC Rcd 4146, 4147 n.3 (1988)(a showing that "at least 50 percent of a community receives a signal of 70 dBu or greater is a reasonable and useful standard for determining adequate community coverage when employing alternative supplemental methods in addition to...[the standard Commission] propagation curves"); Exh. EE at 4-5. Thus, Govan & Cagle urge that Exh. EE completely


rebutts HVBC's claim (and the R&O's conclusion) that the reallocation of Channel 256A from Jefferson City to Cumberland Gap would violate §73.315(b) of the Rules.

### III. Conclusion

13. Govan & Cagle demonstrated in their Petition that the R&O erred in granting HVBC's Jonesville counterproposal in this proceeding. Grant of Govan & Cagle's Cumberland Gap/Elizabethton proposal is fully consistent with the policies and case precedents of FM Channel Policies/Procedures, Community of License, Seabrook, and Calabash, supra, and with the paramount public interest. Therefore, Govan & Cagle respectfully ask the Commission to grant reconsideration of the R&O herein and to amend the FM Table of Allotments consistent with Paragraph 1 above.

Respectfully submitted,

**EATON P. GOVAN, III and  
BERTON B. CAGLE, JR.**

By   
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Dated: February 28, 1996

**CERTIFICATE OF SERVICE**

I, Yvonne Corbett, a secretary in the law offices of Rosenman & Colin LLP, do hereby certify that on this 28th day of February, 1996, I have caused to be mailed, or hand-delivered, a copy of the foregoing "**REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION**" to the following:

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